

INTRODUCTION

It is the intention of this DISCUSSION PAPER ON the development of legislation for the protection and management of heritage resources. It is a preliminary identification of legislative problems and is not a definitive statement. These are still open areas which will have to be taken before legislation is actually drafted. Continued discussion will be a key factor in the process.

LEGISLATION FOR THE PROTECTION AND MANAGEMENT OF HERITAGE RESOURCES

BACKGROUND

Prior to this there have been three major statements of the need for heritage resource legislation and Prepared for YHMA Workshop April 24th, 1982. The first of these came from the historic sites and monuments board. Their recommendations related to the provision of legislation and programming to protect and enhance heritage resources, including revisions to the definitions, procedures and protection and enforcement provisions in legislation.

The Board's insistence on these matters led to the preparation of a Yukon Government proposal on policy and legislation, "A Future for the Past: A Preliminary Discussion Paper on Yukon's Heritage Resources", which was presented to the public in 1980 for comment. This involved a statement of the present status of agencies and activities affecting Yukon Heritage Resources and offered general directions towards program development.

The third statement was presented in "Museums in Yukon: A Profile and Training Report" by John Kyte, a prescription for museum development prepared for Yukon Historical and Museums Association. This report established museum needs and recommended roles for government and the private sector.

The Cabinet decision which centralized government activities related to heritage sources under the Heritage Branch did much to establish the foundation for a number of the programs required to meet the needs expressed in these three statements. These included a more comprehensive treatment of historic sites, the administration of archaeological permits and the support of museum development. With the establishment of this branch there is also a central agency to act as a contact for the public and other government agencies, and a clear allocation of heritage responsibilities within the Yukon Government.

The objectives which the cabinet approved for the heritage branch are as follows:

HERITAGE BRANCH

DEPARTMENT OF HERITAGE AND CULTURAL RESOURCES

1. To develop and manage Yukon's heritage through management of its heritage resources.

Government of Yukon

2. To foster cooperation, coordination and support among the private, community, Territorial and Federal heritage organizations active in Yukon.

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INTRODUCTION

It is the intention of this paper to pose questions for public discussion in the development of legislation for the protection and management of heritage resources. It is a preliminary identification of legislative problems and is not a definitive statement of policy. There are still many steps which will have to be taken before legislation is actually drafted but continued discussion will be a key factor in how and when this occurs.

BACKGROUND

Prior to this there have been three major statements of the need for heritage resource legislation and programming which were either generated by or discussed with the concerned public. The first of these came from the historic sites and monuments board. Their recommendations related to the provision of legislation and programming to protect and enhance heritage resources, including revisions to the definitions, procedures and protection and enforcement provisions in legislation.

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The objectives which the cabinet approved for the heritage branch are as follows:

1. To develop and transmit an understanding of Yukon's heritage through management of its heritage resources.
2. To foster cooperation, coordination and support among the private, community, Territorial and Federal heritage organizations active in Yukon.

3. To coordinate heritage resources policies and programs within government of Yukon.
4. To develop policies and operate programs for museums support and museums staff training.
5. To identify, develop and manage territorial historic sites.

Recently the Council for Yukon Indians has indicated that protection of their culture and heritage is a matter of sufficient importance to them to be raised in the context of land claims negotiations. They wish it to be acknowledged that there are aspects of Indian culture which are of importance to them alone and which they want to manage themselves.

PROBLEMS IN PRESENT LEGISLATION

Heritage resources legislation should accomplish two basic things. Firstly, it should provide protection for heritage resources of all types and, secondly, it should enable the creation of programs to do this and to develop and interpret them. However, the authority and jurisdiction for managing and protecting these resources is spread throughout several pieces of legislation, some Federal, some Territorial, and some which are primarily concerned with areas other than heritage resources but which nonetheless affect them directly. No one piece of legislation, nor any combination, makes a comprehensive address to the treatment of historic resources. The gaps and overlaps in legislative treatment are as follows:

The Yukon Archaeological Site Regulations (Yukon Act) are administered by Heritage and Cultural Resources on behalf of the Minister of DIAND. The regulations concern the licensing of investigations, excavations, collection and removal of artifacts. They also control the disposition of collected specimens. This is a provision of a Federal law administered by a Territorial agency.

There are three inherent limitations in the regulations. First they relate only to buried, or formerly buried works of humans which exclude surficial historic artifacts and palaeontological resources such as fossils.

A second limitation is that there is no provision for any other activities save permit issuance, review and enforcement.

A third limitation is that all formal review of permit applications, and the expertise for review and enforcement, is in Ottawa. This is an arrangement established whereby the Commissioner, under the direction of the Minister of DIAND must seek the advice of Ottawa based experts embodied in an inter-departmental committee chaired by the Archaeological Survey of Canada.

However these regulations do embody a philosophy that cultural property belongs to everyone. This is discussed below in the section "Recognition and Protection".

The National Parks Act pertains only to land based resources of national significance. Similarly, the Historic Sites and Monuments Act relates only to historic sites and museums of national bearing. These are both administered by Parks Canada.

The Historic Sites and Monuments Ordinance, administered by Heritage and Cultural Resources, is a virtual duplicate of its Federal namesake save that it pertains to Yukon. It provides that the Commissioner may mark, buy and make provisions for the care of "Historic Places" and establish historic museums. Major deficiencies in the Ordinance include its lack of clear definitions, the absence of provision for the protection of "historic places" and the unworkable structure of the advisory board.

The Municipal Ordinance allows for the creation of historic control zones. The limitations of this are two-fold. First, there is no provision for the designation of single structures, though presumably one city lot could itself be a zone. Secondly, most municipalities in Yukon do not have the planning capability nor could they support on their own the high cost of strictly enforcing this type of control on development. This Ordinance is administered by Municipal and Community Affairs.

The Parks Ordinance like the National Parks Act, is limited to land oriented heritage resources and historic sites in particular. In this regard it creates an overlap with the Historic Sites and Monuments Ordinance. It is administered through Renewable Resources.

The other piece of legislation used for issuing permits for archaeological investigation is the Scientists and Explorers Ordinance which acts in much the same manner as the Yukon Archaeological Site Regulations. They were for some time used almost interchangeably. It is a broad-based piece of legislation, but, has much the same limitations as the regulations. The Scientists and Explorers Ordinance is, potentially, a very powerful tool. Under it, we have an immense ability to compel the disclosure of information acquired by the scientist or explorer. The Ordinance is administered by Heritage and Cultural Resources.

The Cemeteries and Burial Sites Ordinance provides protection for graves whether or not they are in areas defined as cemeteries. This has implications for the regulation of archaeology. This Ordinance is administered by Municipal Affairs.

The Territorial Land Use Regulations under the Territorial Lands Act provides for the protection of archaeological resources where they are encountered during operations under a land use permit. Encounters are very rarely reported and there is no capability to monitor or enforce these regulations. Administration of these regulations is a joint Territorial-Federal responsibility.

PROBLEM STATEMENT

This demonstrates that existing legislation either does not fully provide for protection, or programs are focussed on a particular type of heritage

resource. The result is that some types of heritage resources are not adequately treated in existing legislation. Many of the matters of overlapping responsibility are the product of Federal legislation and are therefore difficult to change. One problem in the protection of heritage resources for which we are responsible is to fill the present gaps in legislation without creating additional overlaps and adding to the confusion.

Another problem will be to insure that both the timing and nature of legislative changes are supportive of the interest of Indian people as expressed in land claims.

The Historic Sites and Monuments Ordinance is at present the most comprehensive statement of these responsibilities and would appear to be the logical place to begin revisions and modifications. The following sections take this Ordinance as a base, pose various problems for further legislative consideration and in some cases present alternative solutions which could be considered.

BROADEN COVERAGE

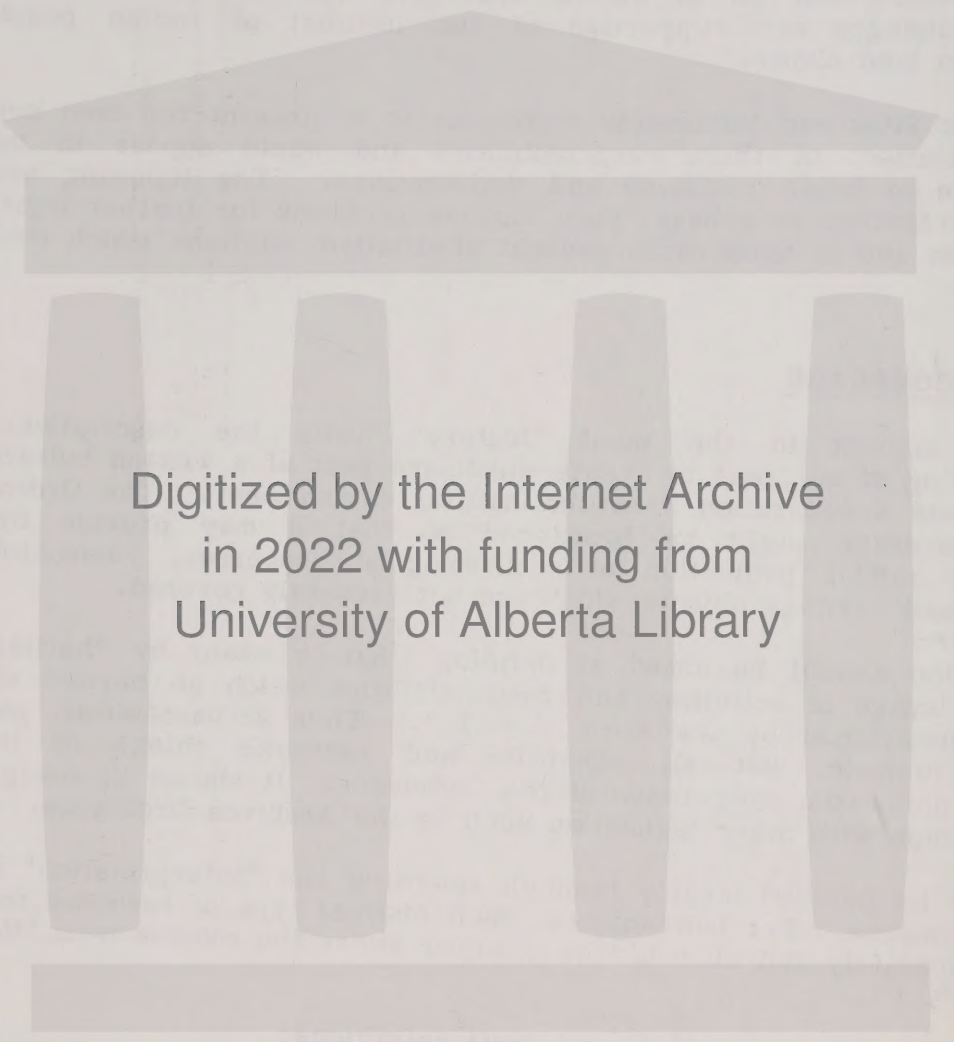
The idea implicit in the word "history" limits the descriptions and understanding of our past to events which are part of a written culture. It also suggests a separation from the natural environment. The Ordinance's area of coverage might be broadened so that it may provide for the recognition and/or protection of archaeological resources, palaeontological resources and heritage objects which are not presently covered.

This revision should be aimed at defining what is meant by "heritage" to indicate a range of activities and responsibilities which go beyond what is normally understood by the word "history". Thus archaeological, palaeontological, historic, natural, scientific and aesthetic things of interest could fall under the competence of the Ordinance. It should be designed to avoid overlaps with other legislation such as the Archives Ordinance.

This could be handled largely through rewriting the "Interpretation" section of the Ordinance. For convenience, each distinct type of resource could be defined separately and all could be grouped under the common term "Heritage Resources".

The following are examples of some draft definitions:

- "Archaeological Resource" means any object or work showing evidence of manufacture, alteration or use by humans that is found in or taken from land or a body of water in Yukon and that is of value for the information that it may give on prehistoric or historic human activity in Yukon.
- "Heritage Resource" means any work of nature, or of humans that is primarily of interest for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest and includes an archaeological resource and a palaeontological resource.



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- "Heritage Site" means any site which includes or comprises a heritage resource of an immovable nature or which cannot be disassociated from its context without destroying some or all of its value as a heritage resource, and includes a prehistoric, historic or natural site or structure.
- "Palaeontological Resource" means those works of nature or classes of works of nature that are designated by the regulations as Palaeontological Resources and includes a work of nature consisting of or containing evidence of extinct multicellular life forms.

RECOGNITION AND PROTECTION

The protection of different types of heritage resources requires methods specific to each type. Appropriate means need to be provided whereby select Heritage Resources may be given formal recognition and protection.

SITES

Formal recognition of a heritage resource, (mostly sites), may come in the form of a proclamation by the Commissioner. Notice of the pending designation, as well as the designation announcement itself should be made widely known, say through the Gazette. This should normally be followed by physical marking such as a plaque, cairn or sign.

Once a resource has been formally recognized or designated for its heritage value, some type of protection is warranted. Apart from physical protection, as is offered by museums or on-site security, a number of legislative provisions are available. For crown owned resources any destruction, damage, alteration or repair can be expressively forbidden and enforced through a stiff penalty clause.

For resources other than those owned by the Crown, protection may come in the form of a restrictive covenant where the owner and government would agree to the specific protective measures to be taken. The degree of restrictions and protective clauses may be directly proportionate to compensation. Land claims settlement and the particular concerns of Yukon Indians for protection of their heritage and culture may make sections of legislation such as this of special interest.

A major concern in provisions of this sort is that restrictive caveats brought to bear on heritage resources, particularly lands, can often prove burdensome to private owners. Such clauses might, therefore, be accompanied by relief clauses which offer compensation to aggrieved owners or by provisions which do not allow the restrictions to be placed without the owner's express consent.

In jurisdictions where there is a great deal of private restoration, studies have indicated that heritage properties are usually more valuable than average properties, even before grants or compensation.

It has been found in most parts of North America that direct compensation for designated historic sites does not work well because heritage agencies, even amongst the richer governments, quickly exhaust their resources on a very few expensive structures.

Preferred alternatives to outright purchase or "damage payments" are incentives whereby the designating agency provides technical and financial assistance towards the restoration of the resource. A second type of incentive is tax relief where part or all of a heritage property's taxes are either paid in grant form or exempted.

OBJECTS

Heritage objects may be protected by restricting their unauthorized transportation from Yukon and removal from recognized heritage sites. This may be limited to include selected types of objects, or it may apply to all objects thought to be of palaeontological, archaeological, historic, and so on, interest which are being transported without a permit.

Ideally, all archaeological and palaeontological resources must be considered significant, at least initially. This would call for an individual to receive a permit to carry and/or remove some types of specimens (e.g. mastadon ivory) if, and only if, a trained archaeologist has seen them in situ and verified that they are not rare palaeontological specimens or that they have not been worked by humans. Practically, this creates real problems in large scale land moving operations such as placer mining, particularly when no trained archaeologist is available for immediate site inspection. A permit system which only partially regulates trade in such objects may have to be accepted as a compromise. Under the Cultural Properties Act, no such specimens may be exported from Canada without verification that they have not been worked by humans.

Heritage objects considered to be abandoned or unclaimed could be placed in the hands of the Crown as a public trust.

There may be a provision whereby ownership of a museum collection reverts to the Crown if the museum ceases operations.

LAND USE IMPACT ON HERITAGE

Land based heritage resources in general could be protected through two types of provisions. The first is a requirement for a "Heritage Impact Assessment" of a land use which will potentially impact heritage resources. This type of provision is especially important in safeguarding buried heritage resources and is so common in the rest of Canada that most major land developers perform them as a matter of course. The onus for the cost of these assessments would normally be on the impactor and their quality content would be specified in regulations. A means of allotting responsibility for mitigation of the impacts which are discovered would need to be defined.

The second provision could be for something similar to a "temporary stop order" in immediate situations where activities impacting, or potentially impacting, heritage resources may be halted to allow interim protection and time to perform assessment, recording and/or salvage.

At present the mechanism through which Yukon Government becomes aware of the need for either of these protection activities is through participation in the Land-use Advisory Committee.

PHILOSOPHY OF PROTECTION

For all their limitations there is a fundamental logic to the Archaeological Site Regulations which is instructive. Their scheme is this: Archaeological sites and artifacts must always be subject to possible protection by the government for the public benefit; therefore, in the first instance the property in those things rests with the government; they can be sought out, explored and possessed only by government consent. When they are discovered they must be disclosed or delivered to the government; in this way the government can make an informed decision about whether the site or artifact is of sufficient importance, for whatever relevant reason, to justify continued protection or whether it can pass out of the public domain and into private ownerships. In fact, this is the substance of what we are now proposing to discuss in relation to all heritage resources.

REVISE ADVISORY BODY

There are a number of alternatives to provide for public involvement in the protection and management of heritage resources. One of these is to revise the structure and functions of the Historic Sites and Monuments Board to improve its effectiveness as a forum for public discussion of heritage issues and increase its expertise. By its own admission, the structure and functions of the last Historic Sites and Monuments Board proved awkward. If a similar board is to be reinstated, that is an appointed standing advisory body to the Minister, the Board suggested that its size be reduced.

The tenure of Board members could be staggered to allow for rejuvenation and continuity. This would allow the participation of a greater variety of interests.

The Board might specifically include representatives from heritage resource interest groups, as well as from the interested public at large.

While the Board might be able to consider a variety of matters as directed by the Minister, its primary role would appear to be as part of the regular process of designating heritage sites and granting assistance to private and municipal sites and museums. It could rely on the Branch for information and support under normal circumstances.

Roles for boards can range from advisory to operational. Discussion of alternatives should occur to ensure that the terms of reference decided on for Yukon are appropriate to our needs. For example, one alternate structure would see an independent body which still acted in an advisory capacity to the Minister but which had its own research capability to make decisions on grants and designations. Such a body would be government funded but operate independently in much the same manner as a corporation. Physical development of government owned resources might or might not remain within Yukon Government depending on the degree of the arms-length relationship.

Another alternative would be to have no standing advisory body at all, where the Minister would be granted the capability to form adhoc advisory boards, when necessary, composed of interest groups or to establish long term advisory relationships with existing interest groups. The procedures and principles of grants and designations would be established in regulations and managed by the Branch on a day to day basis.

Another problem to be discussed concerning the powers of a board advising on heritage in relation to such quasi-judicial boards as, for example, the Water Board. Advice on the protection of heritage will sometimes be in direct conflict with other advice on matters of land-use and development. Although the power of a quasi-judicial board may be a source of frustration for members of a board with an advisory role, the identification of conflicts is an important dimension of planning.

The degree of formality involved in providing a Minister with a "second opinion" from a public body on heritage matters needs to be identified.

ESTABLISH PROGRAM ACTIVITIES

The terms of reference of the Heritage Branch need to be expanded to include more comprehensive heritage resources programming and service, especially for museums.

The present terms of reference under the Ordinance may be expanded to include administration, acquisition, interpretation, development and financial assistance for heritage resources and either the establishment or support of museums and non-government heritage programs of various sorts.

This would allow the treatment of all types of heritage resources, thus filling the various legislative gaps which exist regarding program activities for heritage resources other than "historic places".

Similarly, this would allow the establishment or support of museums programs in the areas of ethnography, science and technology, natural history, and art in addition to historic ones.

The main feature of this expansion would be the development of a financial and technical assistance program which would make funding and training available to museums and restoration projects. It would also clarify the terms and conditions under which such assistance would be made available.

INDIAN HERITAGE

Yukon Indians have special interests in their own cultural heritage. Initiatives to alter legislation to protect and interpret heritage resources in general could be viewed as threatening to these special interests. It should be established from the outset that Yukon Indian heritage is a matter of special concern. Consultation in the development of heritage legislative policy should be sufficient to identify ways in which legislation can support rather than infringe on Indian interest in heritage.

Heritage and Identity are always intertwining themes. Much of the content of Land Claims Negotiations centers on the traditional occupation and use of land by Yukon Indians. The research which supports the claim is, in many senses of the word, heritage research. But beyond understanding the practical necessities of using tradition to support negotiations, it is also important to be sensitive to strongly felt beliefs about special relationships to the land which identify Yukon Indians as a separate and unique people. There is an immediacy to their concern for the past which is different from the general population. Repatriation of ethnographic objects, protection of sites with spiritual significance, and the study of culture and language for use in education are matters which do more than preserve Indian heritage. They make it alive. This is a perspective which must be clearly kept in mind in drafting any legislation for the protection and interpretation of heritage in Yukon.

It should also be kept in mind that the interpretation of heritage can be used as a bridge in cultural understanding. The special heritage of Yukon Indians is also part of the total heritage of all Yukoners and there is therefore a need to protect and interpret it for all. But while there is a genuine interest in the non Indian population in matters of Indian tradition and culture, there is a danger that this interest can be viewed as exploitive.

There are matters for which the Indian people strongly feel they should have the exclusive authority to protect and utilize their past. The role of Yukon Government in relation to Indian heritage should be to support, encourage, and advise - not control. Changes in heritage legislation should therefore be dependent on the negotiations process.

MATTERS OF OVERLAPPING PURVIEW

Other territorial legislation has a bearing on the management of heritage resources. Some areas where the Historic Sites and Monuments Ordinance does or would overlap other pieces of legislation are as follows:

The Parks Ordinance makes provision for the establishment of historic parks and historic zones within parks. The present understanding is that parks shall be land and sites shall be structures. This does not altogether solve the problem since structures always rest on land. The criteria for deciding whether or not the parcel of land on which a site sits is a park is not clear.

A historic park may also include a site of "unique natural or cultural heritage" which would include archaeological and palaeontological resources. These are more land than structure related. In these circumstances there is a need to define individual or joint responsibilities for departments involved in interpretation and operational costs. A mechanism is required through which a decision on park versus site can be made. While the criteria for such decisions are bound to be somewhat qualitative, if not subjective, they could be developed nonetheless. As a legislative provision, decisions regarding historic parks should be referred to the aforementioned advisory body or a committee formed under Parks Ordinance regulations to decide the matter. This would not preclude the Heritage Branch from involvement in a parks project. It would only clarify the primary responsibility. Fort Selkirk is a case in point where some degree of "overlap" is desirable.

Fort Selkirk needs a coordinated approach by several agencies each of whom have, from their own perspective and for their own purposes, a legitimate interest in participating in the management of this parks and historic sites project. The key to success in these circumstances will depend on the good sense of the people administering the legislation. It will not depend upon the content of the legislation.

As there is an overlap between the Archives Ordinance and the section of the proposed revisions dealing with heritage objects, material falling within the mandate of the Archives Ordinance should be specifically exempted from the jurisdiction of a revised Historic Sites and Monuments Ordinance.

Provision could be made for the designation of locally significant heritage resources by a Municipal authority either under a revised Historic Sites and Monuments Ordinance or under the new Municipal Ordinance and the Area Development Ordinance.

This could be enacted through establishing community heritage authorities on the same model as that of Yukon Government. The Municipal Council would act in place of the Minister and could establish their own heritage advisory committees.

Technical and financial assistance could be made available for the planning and development of both historic control zones and municipal heritage properties.

There is a potential conflict between the Cemeteries and Burial Sites Ordinance and archeological regulations in any archaeological excavations where a human burial is encountered. The balance between protection of human burials and the need for archaeological research should be considered.

REPEAL OF ORDINANCE

The phrase "historic sites and monuments" is not descriptive of the range of topics under discussion. The extensive revisions required would warrant the rewriting, rather than simple amendment of the Historic Sites and Monuments Ordinance. It is suggested that it be repealed when the new Ordinance is declared.

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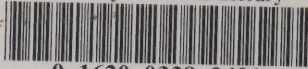
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